**THE PUBLIC SERVICE COMMISSION**

**OF SOUTH CAROLINA**

**DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E**

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| **IN RE:** | Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent | |
| **IN RE:** | Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920 | **MOTION TO SANCTION JOINT APPLICANTS AND TO COMPEL PRODUCTION OF WRONGFULLY WITHHELD DOCUMENTS IN JOINT APPLICANTS' PRIVILEGE LOG** |
| **IN RE:** | Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans | |

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The South Carolina Office of Regulatory Staff ("ORS") respectfully moves[1] the Public Service Commission of South Carolina ("Commission") for an expedited review and order (i) sanctioning South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion") (collectively "Joint Applicants") for failing to comply with the Commission's

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[1] *See* S.C. Code §§ 58-4-55(A)(2), 58-4-55(A), 58-27-160, 58-27-1570, 58-27-1580 & 58-33-277; S.C. Code Ann. Regs. 103-833 & 103-835; Rules 26, 33, 34 & 37, SCRCP.

Order No. 2018-73-H (the "Order"), and (ii) compelling Joint Applicants to produce certain wrongfully withheld documents listed in the privilege log submitted by Joint Applicants on July 6, 2018 (the "Privilege Log")[2] or, in the alternative, requiring Joint Applicants to submit these documents to the Commission for *in camera* review to determine whether any of the withheld documents, or portions thereof, are subject to a claim of privilege.

As further explained below, Joint Applicants have acted in flagrant disregard of the Order, which required production of the Bechtel Report and all documents related to it by July 6, 2018. Instead of complying with this Order, Joint Applicants have to date produced only a handful of Bechtel documents. Sanctions are appropriate to address Joint Applicants' unjustified and cavalier behavior. In addition, Joint Applicants have refused to produce hundreds of documents responsive to ORS Request No. 5-26, wrongfully claiming these documents are subject to attorney-client privilege and/or work product protection. Review of Joint Applicants' Privilege Log, however, demonstrates these documents are not privileged, and ORS is entitled to a motion to compel their production.

## BACKGROUND

### I. Bechtel Documents

On May 23, 2018, ORS filed a motion to compel against Joint Applicants. *See* Exhibit A. Among other things, the motion sought production of the Bechtel Report and related documents, including draft reports and communications about the Report. These documents are the subject of ORS Request Nos. 2-5, 6-6, 6-7, 6-8, and 6-9. (*See* Exhibit A at 4-11)

[2] The Privilege Log has been designated confidential by the Joint Applicants. ORS disagrees with this designation and believes it is necessary for the Commission to review the Privilege Log in connection with its consideration of this Motion. ORS is filing a motion contemporaneously herewith for permission to file the Privilege Log under seal.

In their response to the motion to compel, Joint Applicants indisputably consented to disclose any and all documents and communications related to the engagement of Bechtel and the Bechtel Reports. Specifically, Joint Applicants voluntarily and unambiguously stated that "SCE&G, through its parent company SCANA, has decided to produce documents that provide ***the full account of the Bechtel engagement and assessment***, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report." (*See* Exhibit B, Joint Applicants' Response to Motion to Compel at 5 (emphasis added)) Joint Applicants went so far as to claim that "SCE&G's decision to disclose the privileged Bechtel Materials render[ed] the remainder of ORS' motion moot." (*Id.*)

Not only did Joint Applicants ***state*** they were waiving the privilege in their response, they ***completed that waiver*** by attaching handwritten notes of two of SCE&G's top executives concerning communications between those executives and SCE&G's counsel George Wenick, all in an attempt to selectively paint Joint Applicants' version of the events surrounding the Bechtel engagement.[3] (*See* Exhibits 4 & 5 to Exhibit B)

Although ORS vigorously disputes that a claim of privilege ever properly applied to the Bechtel Reports and related documents, Joint Applicants' concessions and actions resolve the question, as the Commission itself recognized in its order granting the motion to compel production of the Bechtel documents. Addressing the Bechtel Report, "its drafts, alternative

[3] As the South Carolina Court of Appeals noted in *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct. App. 1984), voluntary disclosure waives the attorney-client privilege not only as to the specific communication disclosed, but also to "all communications between the same attorney and the same client on the same subject." The reason behind this rule is "one of basic fairness," as a party "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final." *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1161-62 (D.S.C. 1974).

reports, working papers, references, responses, and other related documents, including all communication relating to the assessment of the Report," this Commission stated that "SCE&G shall produce the responsive documents . . . on or before July 6, 2018." (Order at 2)

What ORS actually received on July 6, 2018, however, was a *de minimis* production of two pages of notes. Joint Applicants also listed some 62 documents responsive to the Bechtel requests in their Privilege Log, wrongfully asserting a claim of privilege over these 62 documents despite having waived that privilege earlier. ORS raised these issues to Joint Applicants in a deficiency letter dated July 17, 2018, (*see* Exhibit C) hoping to resolve this dispute and to obtain the full and complete responses that Joint Applicants had pledged to provide and that this Commission had ordered Joint Applicants to provide. In response, Joint Applicants stated on July 20, 2018 – ***nearly two weeks after this Commission's mandated production date*** – that SCE&G was still "reviewing Bechtel-related documents to determine what material may be disclosed," and that SCE&G required "additional time to make these determinations." (Exhibit D at 4) Subsequent telephone conferences between ORS and Joint Applicants have not resulted in any further productions of Bechtel documents, and to date ORS still lacks the promised full production of these documents, severely hampering ORS's ability to complete its own analysis.

## II. Documents Responsive to Request 5-26

ORS's motion to compel also sought production of a privilege log with respect to documents responsive to Request No. 5-26, documents which were then and remain to date unilaterally withheld by Joint Applicants on claims of privilege. Request No. 5-26 concerns "information related to [certain specified] analyses and case studies prior to the decision to abandon the [V.C. Summer] project." (*See* Exhibit E at 9) These documents obviously relate

directly to the economic viability of the project and the prudency or business rationale of SCE&G's decision to abandon it – the ***very same determination*** that this Commission is being asked to make in these proceedings. As ORS reasoned in its motion to compel, the privilege log was necessary in order for ORS to evaluate Joint Applicants' privilege claims with respect to these documents and determine whether the privilege was being asserted appropriately.

Review of the Privilege Log produced on July 6, 2018, demonstrates that ORS's fear that Joint Applicants were making overbroad claims of privilege was well-founded. Well over 80% of the 519 entries listed on the Privilege Log are documents identified as responsive to Request No. 5-26. Most of these documents involve no attorneys whatsoever and appear to be solely business-related discussions by and among SCE&G management between March and October 2017. (*See e.g.,* Privilege Log entries Nos.185-216 and 283-318) The description provided of these documents corroborates that they are related to business or prudency decision-making rather than privileged communications, in that all are described as "regarding the viability of the project post [Westinghouse Corporation] bankruptcy."

## APPLICABLE LEGAL STANDARDS

This Commission has broad authority to fashion an appropriate sanction to address Joint Applicants' failure to comply with the discovery process and the Commission's Order to produce the Bechtel documents. Although no commission rule addresses the authority to impose sanctions, that authority is clear in the South Carolina Rules of Civil Procedure, which apply in the absence of any applicable Commission rule. S.C. Code Ann. Regs. 103-835. Rule 37(b)(2), SCRCP, provides in pertinent part that, if a party fails to obey an order for discovery, the court "may make such orders in regard to the failure as are just," including (A) ordering that certain matters or designated facts be deemed established in accordance with the claim of the

party obtaining the order; (B) prohibiting the party from supporting or opposing designated claims or defenses, or prohibiting him from introducing certain matters into evidence; (C) striking the pleadings or parts thereof, dismissing all or part of the action, or rendering a judgment by default against the disobedient party; and/or (D) treating the violation as a contempt of court. In addition, the court may order the party to pay the reasonable expenses, including attorney's fees, that were caused by the failure to comply with the discovery order. *See Temple v. Tec–Fab, Inc.*, 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App. 2006) (*citing In re Anonymous Member of the S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)) ("[j]udges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.").

This Commission also has authority to order the production of documents wrongfully withheld on claims of privilege, or in the alternative, to order these documents be submitted for *in camera* review. As an initial matter, Joint Applicants themselves bear the burden of showing that each of the 519 documents on their 49-page Privilege Log is privileged, including the documents listed as responsive to the Bechtel requests and Request No. 5-26. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) ("In general, the burden of establishing the privilege rests upon the party asserting it."). The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances. *Love,* 275 S.C. at 59, 271 S.E.3d at 112 (1980). In general, the following guiding principles apply when reviewing a claim of privilege:

(a) underlying facts are never privileged,

(b) communications made to an attorney by a client seeking business advice are not privileged;

(c) merely copying a lawyer on an e-mail does not, by itself, make the e-mail privileged,

(d) merely attaching something to a privileged document does not, by itself, make the attachment privileged,

(e) the party arguing that a document is privileged has the burden of establishing privilege with respect to each and every document; and

(f) claims of attorney-client privilege must be asserted on a document by document basis.

*See Human Tissue Prods. Liability Litig.,* 255 F.R.D. 151, 164 (D.N.J. 2008).

## ARGUMENT

### I. Sanctions Are Needed to Address Joint Applicants' Failure to Comply with the Commission's Order to Produce Bechtel Documents

Sanctions are the appropriate response to Joint Applicants' continued failure to produce the Bechtel documents. Claims of privilege over these documents, which were wrongly asserted in the first place, *see* Exhibit A at 4 - 11, have been waived. *See* pp. 4-5 *supra* and Exhibits 4 & 5 to Exhibit B. Joint Applicants have furthermore had more than sufficient time to gather, review, and produce these responsive documents, as the applicable discovery requests seeking the documents were issued months ago.[4] Most importantly, this Commission required the production of these documents in its Order on June 21, 2018, allowing Joint Applicants an additional two weeks to review and produce them before a set deadline of July 6, 2018. (Order at 2)

[4] ORS served its second set of discovery requests on Joint Applicants on February 13, 2018, and the sixth set was served on April 11, 2018.

That deadline – and a further month – have now passed, and despite repeated efforts by ORS and its counsel to secure the Bechtel documents, a mere handful have been forthcoming. Further delay – whatever the reason for it – is neither justified nor excusable; instead it severely prejudices the ability of ORS to do the work statutorily required in these proceedings.

Pursuant to Rule 37(b)(2), SCRCP, when a party fails to obey an order to provide or permit discovery, the court has the discretion to "make such orders in regard to the failure as are just." Rule 37(b)(2), SCRCP; *see McNair v. Fairfield Cnty.*, 379 S.C. 462, 465, 665 S.E.2d 830, 832 (Ct. App. 2008) (finding "when a party fails to comply with a discovery order, the court has the discretion to impose a sanction it deems just."); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) ("The selection of a sanction for discovery violations is within the court's discretion."). This includes an order that certain matters or designated facts be deemed established in accordance with the claim of the party obtaining the order and an order dismissing the action. *See* Rule 37(b)(2)(A) & (C), SCRCP; *see McNair*, 379 S.C. at 465, 665 S.E.2d at 832 ("When a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action.").

Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, "[w]hatever sanction the judge imposes should serve to protect the rights of discovery provided by the Rules." *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 217-18 (Ct. App. 1997) (*citing Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987)). And while a court's discretion to fashion a sanction is broad, "overly lenient sanctions are to be avoided when they result in inadequate protection of discovery." *Samples*, 329 S.C. at 114, 495 S.E.2d at 217 (*citing Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th

Cir.1970), *cert. denied sub nom., Trefina* v. U.S., 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970)); *see also Temple v. Tec–Fab, Inc.*, 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App. 2006*) (citing In re Anonymous Member of the S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)) ("[j]udges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law."). "Severe sanctions" are moreover appropriate "in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair*, 379 S.C. at 465, 665 S.E.2d at 832.

The entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party." *Samples*, 329 S.C. at 113–14, 495 S.E.2d at 217 (*citing State Highway Dep't v. Booker*, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (internal quotations omitted)). Thus, our Courts have repeatedly warned that discovery exists to allow the parties "to prepare for trial," and that "when these rights are not accorded, ***prejudice must be presumed***." *Samples*, 329 S.C. at 113–14, 495 S.E.2d at 217; *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003).

ORS respectfully argues that the unjustifiable behavior of Joint Applicants merits severe sanctions. Joint Applicants' failure to abide by the Order of this Commission has been willful, in gross indifference to the rights of ORS, and caused prejudice to ORS's ability to do its work. Under these circumstances, and pursuant to Rule 37(b)(2), ORS respectfully requests the Commission enter an Order drawing the following adverse inferences and/or establishing the following designated facts from Joint Applicants' flagrant violation of the Commission's Order: (i) SCE&G engaged in a deliberate scheme to conceal information from ORS and the Commission with respect to the Bechtel documents and the facts and conclusions contained in

them; and (ii) the Bechtel documents support the conclusion that SCE&G should not be allowed to include any costs **incurred after at least October 22, 2015**,[5] related to the V.C. Summer Project in the rate base for the setting of future rates. ORS also requests the Commission impose a monetary sanction on Joint Applicants for the fees and costs that ORS has incurred in bringing this issue to the Commission, and order Joint Applicants to produce immediately all Bechtel-related documents, including all such documents listed on Joint Applicants' Privilege Log. Joint Applicants' non-compliance with the Order of this Commission cannot be allowed to continue. The sanctions proposed – or such others of a like severity that this Commission may determine appropriate – are needed to address Joint Applicants' behavior and restore order to the discovery process in these proceedings.

## II. Joint Applicants Should Be Ordered to Produce Documents Responsive to Request 5-26 and Wrongfully Withheld

In addition to Joint Applicants' willful disobedience of this Commission's Order, review of the Privilege Log produced on July 6, 2018 reveals that Joint Applicants are making overbroad and unjustified claims of privilege over some 406 documents responsive to Request No. 5-26. (*See* Exhibit B to Exhibit C) As noted above, this Request seeks "information concerning analyses and case studies prior to the decision to abandon the NND Project." These documents relate to the very heart of these proceedings and the decision before this Commission, and Joint Applicants' spurious claims of privilege or work-product protection

[5] Discovery is ongoing, and ORS has not finalized its position regarding what it would recommend to this Commission as prudently incurred abandonment costs. It is ORS' position that at a minimum, any cost incurred after October 22, 2015 should be disallowed because of SCE&G's acts with regard to the Bechtel materials.

should not be allowed to hide them from the fact-finding mission of ORS and the deliberations of the Commission.

**A. The withheld communications involve business, not legal advice, and therefore are not protected by attorney-client privilege.**

Careful review of the Privilege Log demonstrates that the withheld communications identified as responsive to Request No. 5-26 involve business, not legal, advice, and the attorney-client privilege does not extend to such discussions.

It is axiomatic that not every communication within the attorney-client relationship is privileged from production. As our Supreme Court has recognized, the public policy of protecting confidential communications must be balanced against the strong public interest in the proper administration of justice. *State v. Doster*, 276 S.C. 647, 651 (S.C. 1981). South Carolina courts have established eight requirements Joint Applicants must demonstrate for every withheld communication responsive to Request No. 5-26:

> Where (1) legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 531 (2010). The first and second requirements necessitate that the client is seeking *legal* advice from a *lawyer*. *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) (The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance."); *Church of Christ at Azalea Drive v. Forest River*, Inc., No. 2:11-CV-3371-PMD, 2013 WL 2285934, at *4 (D.S.C. May 23, 2013). Importantly, what is "vital to the privilege is that the communication be made in confidence for the purpose of obtaining *legal*

advice . . ." *Church of Christ at Azalea Drive*, 2013 WL 2285934, at *4) (*citing United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (emphasis added)).

Thus, the privilege is limited only to situations in which the attorney was acting as a legal advisor, *Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct. App. 1984) (finding "in order to protect a communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor."); and the primary purpose of the communication was to solicit legal as opposed to any other type of advice, including business advice. *See Imperial Textile Supplied Inc. v. Hartford Fire Ins. Co.*, 2011 WL 1743751, at *2 (D.S.C. May 5, 2011); *Henson v. Wyeth Labs., Inc.*, 118 F.R.D. 584, 587 (W.D. Va. 1987) (finding attorney-client privilege does not apply where an attorney receiving a communication acts as a business advisor, or where the communication is to obtain business, rather than legal advice); *Burden–Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) (the privilege is limited to situations in which the attorney is acting as a legal advisor — business and financial advice are not protected).

In addition, "Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected." *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 411 (D. Md. 2005); *see generally, Nix v. Holbrook*, No. CIV.A. 5:13-02173-JM, 2015 WL 631155, at *6 (D.S.C. Feb. 13, 2015) (*citing Alomari v. Ohio Dep't of Pub. Safety*, C/A No. 2:11–cv–00613, 2013 WL 4499478, at *4 (S.D. Ohio Aug.21, 2013) (the attorney-client privilege "applies only to communications made to an attorney in his capacity as legal advisor. Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.") (Internal quotation marks and citation omitted)).

The communications responsive to Request 5-26 necessarily concern the economic viability of the project, prudency decisions, and other decisions of a business nature, and bear no relationship to the provision of legal advice by an attorney. The Privilege Log entries responsive to Request No. 5-26 admit as much, in that the communication are described as "regarding the viability of the project post WEC-bankruptcy." (*See, e.g.* Privilege Log entries nos. 80-346) Even if legal advice was interwoven in some of these communications, there is nothing indicating the communications were ***primarily*** for the purpose of securing legal, as opposed to business, advice. *See Nix*, 2015 WL 631155, at *6 (internal citations omitted). It is not plausible for Joint Applicants to claim that attorney-client protections extend to such obvious business discussions.

Further corroborating the business-related nature of these documents is the fact that many (if not most) of the documents logged as responsive to Request No. 5-26 involve no attorneys whatsoever, but are merely communications between or among management. *See, e.g.*, Privilege Log entries nos. 242-246 and 252-268. A claim of privilege over mere business discussions among management is unjustified. In *State v. Poster*, 276 S.C. 647, 652, 284 S.E.2d 218, 219 (1981), the South Carolina Supreme Court explained that "the [attorney-client] privilege must be tailored to protect only confidences disclosed within the [attorney-client] relationship." *See also Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2015 WL 12910907, at *3 (D.S.C. Sept. 23, 2015), *report and recommendation adopted*, No. 2:13-CV-1831-DCN, 2015 WL 12907896 (D.S.C. Nov. 5, 2015).

For those few documents logged as responsive to Request No. 5-26 that actually do involve internal or external counsel, merely including an attorney or attorneys among the recipients does not automatically privilege a communication. *See Motley v. Marathon Oil Co.*,

71 F.3d 1547, 1550-51 (10th Cir. 1995) ("[T]he mere fact that an attorney was involved in a communication does not automatically render the communication subject to attorney-client privilege."). Moreover, it is well established that merely copying an attorney on an email where no legal advice is sought does not establish that the communication is privileged. *See Lewis v. Wells Fargo Co.*, 266 F.R.D. 433, 435 (N.D. Cal. 2010); *see also ABB Kent-Taylor, Inc. v. Stallings and Co., Inc.*, 172 F.R.D. 53, 57 (W.D. N.Y. 1996) ("Counsel were copied on many of the emails, *but it is well settled that merely copying an attorney on an email does not establish that the communication is privileged.*") (emphasis added). As reiterated herein, in order to withhold a communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor. *Marshall*, 282 S.C. at 539, 320 S.E.2d at 47. The Privilege Log entries make no such showing. As is evident, the withheld communications involve primarily business discussions and should be produced to ORS.

**B. The withheld documents were created in the ordinary course of business and are not protected by the work product doctrine.**

Joint Applicants' claim that work product protection applies to the documents responsive to Request 5-26 is just as meritless as their claim to applicability of the attorney-client privilege. As discussed above, Request 5-26 seeks documents about the business and economic prudency decision-making of SCE&G with respect to the V.C. Summer project. The documents responsive to Request No. 5-26 were created in the ordinary course of business, and work product protections do not extend to such obvious business materials.

The work product doctrine is distinct from the attorney-client privilege. But as with the attorney-client privilege, documents that are not primarily ***legal*** in nature are not protected under the work product doctrine, and should be produced. *See, generally, Hege v. Aegon USA,*

*LLC*, No. 1:10-CV-1635-GRA, 2011 WL 1791883, at *6 (D.S.C. May 10, 2011); *see also Loctite Corp. v. Fel–Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981) ("Only where the document is primarily concerned with legal assistance does it come within [work product] privileges.").

The work product doctrine protects from discovery only documents prepared in anticipation of litigation. *Tobaccoville*, 387 S.C. at 294, 692 S.E.2d at 530; *Nix v. Holbrook*, No. CIV.A. 5:13-02173-JM, 2015 WL 631155, at *3 (D.S.C. Feb. 13, 2015). The first and central inquiry in evaluating a claim of work product protection, therefore, is whether the document a party seeks to protect was prepared "in anticipation of litigation." *Hege*, 2011 WL 1791883, at *6. The party opposing discovery bears the burden of showing that information or materials withheld from discovery meet this criterion. *Nix*, 2015 WL 631155, at *3 (*citing Sandberg v. Va. Bankshares, Inc.* 979 F.2d 332, 355 (4th Cir. 1992)).

In general, when "determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared ***because of the prospect of litigation***." *Tobaccoville*, 387 S.C. at 294, 692 S.E.2d at 530 (emphasis added). In this regard, the District Court of South Carolina in *Hege* explicitly recognized that the "***driving force*** behind the preparation of each requested document" must be the prospect of litigation. No. 1:10-CV-1635-GRA, 2011 WL 1791883, at *6 (D.S.C. May 10, 2011) (emphasis added). The *Hege Court* further reasoned that in order to conclude that a document falls under work product protection, a court must be satisfied that the document "was not created during the ordinary course of business . . . ***or for any non-litigation reason***. If the work product would have been done in any event, it is not protected work product." *Id.* (emphasis added); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) (For work product doctrine to apply, "[t]he document "must be prepared because of

the prospect of litigation when the preparer faces an actual claim or a potential claim," as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes.").

The Fourth Circuit has succinctly explained that "materials prepared ***in the ordinary course of business*** or pursuant to regulatory requirements . . . do not constitute documents prepared in anticipation of litigation protected by [] privilege." *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221, 232 (4th Cir. 2011) (emphasis added). In other words, to conclude that a document falls under the privilege, a court must be satisfied that the document "was not created during the ordinary course of business" or for any non-litigation reason. *Id.*

Importantly, when documents have dual-purposes, both legal and business related, the work product protection does ***not*** apply. Courts have recognized that "[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged." *Baxter Travenol Labs., Inc. v. Abbott Labs.*, No. 84 C 5103, 1987 WL 12919, at *5 (N.D. Ill. June 19, 1987); *see also United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) (holding that "a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged.").

As evidenced in the Privilege Log, there is no indication that the withheld documents responsive to Request No. 5-26 were prepared in anticipation of litigation (or, at any rate, exclusively in anticipation of litigation).[6] Rather, from all appearance they would have been

[6] SCE&G has vaguely asserted that the studies and analysis sought under Request No. 5-26 were prepared "in preparation for a potential [Base Load Review Act] proceeding resulting from Westinghouse's bankruptcy" and that the efforts to create these documents were "conducted by outside regulatory counsel." (Exhibit D at 4) Even if that were true, the studies

prepared in substantially identical form with or without the input from Joint Applicants' attorney(s) to assist in making business decisions concerning the viability of the project and prudency of continuing or abandoning it after the Westinghouse bankruptcy. *See Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-1786JSW(EMC), 2004 WL 1878209, at *7-8 (N.D. Cal. Aug. 23, 2004) (finding that the documents prepared with the assistance of attorneys would have been prepared in substantially identical form to assist in making a business decision, and therefore no privilege or work product protection was accorded). Indeed, Joint Applicants' own language supports this notion. As addressed above, the vast bulk of Privilege Log entries responsive to Request No. 5-26 describe the withheld document as "regarding the viability of the project post WEC-bankruptcy." Through Joint Applicants' own words, these documents concern business decisions and advice. Because these documents were not created because of the prospect of litigation, the work product doctrine is not implicated here.

Joint Applicants should not be allowed to shield the business and prudency discussions responsive to Request No. 5-26 under the guise that these documents are "work product."

**C. Even if the documents responsive to Request No. 5-26 were subject to a claim of privilege or work product protection, that claim has been waived as a result of prior disclosures to ORS**

Even assuming *arguendo* that claims of attorney-client privilege or work product protection apply to the business-related documents responsive to Request No. 5-26, the Joint Applicants have waived such protections through prior partial disclosures made to ORS last year.

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and analyses clearly had a business purpose as well, and the mere utility of the documents for future litigation or the periodic involvement of outside regulatory counsel does not transform prudency and economic viability studies into attorney work product prepared in anticipation of litigation.

Request 5-26 seeks certain "case studies and analyses" showing a number of different specified scenarios at the V.C. Summer Project. The first three of five of these are described in the Request as follows:

i. Completing both Units 2 and 3 (referenced in paragraph 82 of the Merger Application). This case was previously made available to ORS in July 2017.

ii. Completing Unit 2 and abandoning or delaying Unit 3 (referenced in paragraphs 85-86 of the Merger Application).

iii. Completing Unit 2 and abandoning or delaying Unit 3 in the case that Santee Cooper did not pay its 45% share of the construction and operating costs (referenced in paragraph 90 of the Merger Application). If no economic analysis was performed, please explain how SCE&G determined this option would not be feasible or beneficial to customers.

(Exhibit E at 9). As indicated in subpart (i) of the Request, certain of these documents were assumed to be already made available to ORS during the summer of 2017 (although SCE&G's direct testimony show results different than those previously made available). ORS pointed out this fact in its July 17, 2018 deficiency letter, explaining that the documents responsive to subpart (i) were disclosed to ORS's consultant Norm Richardson last summer and were "a portion of the same larger set of information now sought in Request 5-26." (Exhibit C at 5) SCE&G ***conceded*** these facts in a July 31 response letter, but nevertheless maintained, without elaboration, that the documents sent to Norm Richardson last summer were only non-privileged documents, and that those listed on the Privilege Log were "studies specifically prepared at the direction of outside regulatory counsel related to the abandonment analysis." (Exhibit F)

Joint Applicants' pattern of "selective disclosure" should not be allowed to thwart the fact-finding duty of ORS. Joint Applicants have offered no rationale or support for their assertion that the documents logged are any different in origin, creation, content, design, or internal use at SCE&G than those produced last summer; the withheld documents are simply

case studies and analyses addressing two additional scenarios at V.C. Summer other than the scenario set out in subpart (i) of Request 5-26.

A full picture of SCE&G's economic and prudency decision-making is needed, not simply the picture that SCE&G would paint via strategic and partial coloring. Neither work-product protection nor attorney-client privilege justifies selective disclosures of certain documents and protection of others concerning the same general subject. *See Marshall*, 282 S.C. at 538, 320 S.E.2d at 47 (voluntary disclosure of specific communication results in waiver of all communications between the same attorney and the same client on the same subject); *In re John Doe Corp.*, 675 F.2d 482, 488 (2d Cir. 1982) (disclosure of communications to entity outside corporation not acting under authority of counsel waives privilege); *In re Martin Marietta,* 856 F.2d 619, 625 (4th Cir. 1988) (holding that Martin Marietta's disclosure to government agencies which were adverse to it constituted testimonial use of the work product and thus the privilege was waived);

Accordingly, Joint Applicants have waived any applicable privilege with respect to the documents and communications responsive to Request No. 5-26 and should be required to produce them.

**D. Joint Applicants have also waived the documents sought under Request 5-26 by discussing them in a related proceeding in federal court**

Not only have Joint Applicants made a partial disclosure already of the case studies and analyses responsive to Request 5-26, they have also disclosed what they allege to be the very conclusions of these studies in a related proceeding.

In June 2018, SCE&G filed an action in United States District Court seeking declaratory and injunctive relief to block enforcement by the State of South Carolina of

recently enacted legislation amending the Base Load Review Act. In its Complaint, SCE&G referred specifically to the very same case studies and analysis sought in Request 5-26. Specifically, SCE&G alleged:

> 149. After Westinghouse's bankruptcy filing and its notice of intent to reject the EPC Contract, the Owners were left with no good options related to the project. For its part, SCE&G evaluated all of its options, including completing both Units, abandoning both Units, and completing one Unit while delaying or abandoning the other.
>
> 150. Through an Interim Assessment Agreement with Westinghouse, which was executed at the time of Westinghouse's bankruptcy filing, SCE&G obtained direct access to Westinghouse's internal and proprietary construction scheduling and cost data, commodity quantity and installation rates, vendor and supplier contracts, and other information, most of which had been previously unavailable to SCE&G.
>
> 151. This internal Westinghouse information revealed significant deficiencies in Westinghouse's estimation of the timeline and costs associated with completion of the project.
>
> 152. After a careful assessment of the Westinghouse internal data (which only became available following the bankruptcy filing), SCE&G concluded that, despite Westinghouse's repeated representations and guarantees to the contrary, the Consortium likely would not have been able to complete Unit 2 until December 31, 2022, and Unit 3 until March 31, 2024.
>
> 153. SCE&G further determined that its total cost to complete both Units—even after accounting for a guaranty payment by Toshiba of approximately $1.1 billion—would be $8.8 billion in future dollars, an increase of $1.1 billion from the $7.7 billion (in future dollars) estimated as of the 2016 Petition for Revisions. Meanwhile, the cost to complete only Unit 2 would be approximately $7.1 billion.

Complaint, *SCE&G v. Whitfield et al.*, Civ. Action No. 3:18-cv-1795-JMC, at ¶¶ 149-153. SCE&G cannot seek relief in one action based on the content and conclusions of documents sought under Request 5-26 and simultaneously maintain these same documents are "privileged" in another action.

**E. Joint Applicants' abuse of claims of privilege in related proceedings supports the conclusion that privilege is also being wrongly asserted here**

Joint Applicants' overbroad claims of privilege have not been limited only to the proceedings before the Commission. Plaintiffs in one of the ratepayer actions pending in South Carolina Circuit Court, *Lightsey et al. v. SCE&G et al*, No. 2017-CP-24-335 ("*Lightsey*"), have recently filed a motion seeking to compel production of documents listed on another privilege log from SCE&G. (*See* Exhibit G) Although the documents Plaintiffs are moving to compel in *Lightsey* are different from those ORS is seeking here, SCE&G's practice in *Lightsey* concerning claims of privilege is strongly suggestive of what is likely occurring here.

In *Lightsey,* SCE&G produced numerous documents subject to partial redaction, asserting that the redactions were meant to protect allegedly "privileged" communications. The same documents, however, were inadvertently produced by SCE&G in un-redacted form, and comparison of the redacted and unredacted versions showed that the redactions concerned "information patently not privileged." (Exhibit G at 6) "In every instance where a document was produced in both redacted and non-redacted form," Plaintiffs explained in their motion, the privilege claim by SCANA on the log was clearly erroneous either in substance or merit." (*Id.* at 16)

If Joint Applicants are abusing claims of privilege in *Lightsey*, that suggests, at a minimum, this Commission should be cautious and skeptical in assessing such claims here, and hold Joint Applicants to the burden of demonstrating that privilege applies.

**F. To the extent there is any doubt regarding privilege, the Commission should conduct an *in camera* review of the documents**

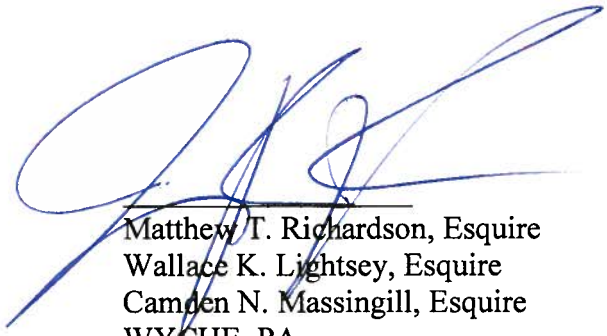
If the Commission has any doubt about requiring production of documents responsive to Request No. 5-26, it should order them to be produced to the Commission for *in camera* review. South Carolina cases require *in camera* review whenever there is a legitimate dispute

as to the applicability of the work product doctrine or the attorney-client privilege. *See Wellin*, 2015 WL 5785709, at *23 (recognizing the need for *in camera* inspection where application of attorney client privilege and work product protection are contested); *First S. Bank v. Fifth Third Bank, N.A.*, No. CV 7:10-2097-MGL, 2012 WL 12898229, at *1 (D.S.C. Oct. 2, 2012) (same). At a minimum, the low bar of a "legitimate dispute" is met here.

## CONCLUSION

The discovery process in proceedings of this Commission is not a game. Orders directing discovery cannot be ignored, nor can (or should) facts be shielded from disclosure through wrongful and abusive invocation of privilege or work product protection. ORS respectfully requests that Joint Applicants be sanctioned for their willful failure to comply with the Commission's June 21 Order requiring production of the Bechtel documents, and that Joint Applicants be ordered to produce documents responsive to Request No. 5-26.

Respectfully submitted,



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